No. 13-19-00486-CV

IN THE COURT OF APPEALS FOR THE
THIRTEENTH JUDICIAL DISTRICT OF TEXAS
CORPUS CHRISTI-EDINBURG

MSW Corpus Christi Landfill, Ltd.,
Appellant and Cross-Appellee

v.

Gulley-Hurst, L.L.C.,
Appellee and Cross-Appellant

Appeal from 117th District Court, Nueces County, Texas

MSW CORPUS CHRISTI LANDFILL, LTD.'S APPELLEE'S BRIEF IN RESPONSE TO BRIEF OF CROSS-APPELLANT GULLEY-HURST

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ORAL ARGUMENT REQUESTED

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[1] For the Identities of Parties and Counsel, please see MSW's Appellant's Brief filed October 16, 2020, incorporated herein by reference.

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TO THE HONORABLE THIRTEENTH COURT OF APPEALS:

COMES NOW Appellant and Cross-Appellee MSW Corpus Christi Landfill, Ltd. and files its Appellee's Brief in response to the brief of Cross-Appellant Gulley-Hurst, LLC ("GH"), and in support of its position that the portion of the judgment contested by GH must in all things be affirmed, would respectfully show the Court:

BRIEF STATEMENT IN RESPONSE

MSW would point out that if its issues presented are overruled, and GH's issues are sustained, then MSW will have no recovery whatsoever for the wrongdoing found by the jury in this case. The jury heard six days of testimony, weighed the credibility of the witnesses and the evidence, and found wholly in favor of MSW. GH did not comply with the parties' settlement agreement. As a result, GH never purchased MSW's one-half interest in this Landfill. But GH has been in full control of the property and operations since 2013. The trial court stripped MSW of nearly all of its claims, then stripped MSW of the value of its one-half interest in the Landfill, which GH controls. GH now asks this Court to strip MSW of its lost use of money claim as well. This would leave MSW with absolutely nothing, while GH controls a $35+ Million asset and reaps every benefit from the property. Notably, GH has not contested the liability findings against it. MSW is entitled to recovery.

MSW's issues presented in its opening brief must be sustained, in whole or in part. GH's issues presented must in all things be overruled. The jury's verdict cannot

be so cavalierly ignored, as GH posits. The judgment should be affirmed as to that portion assailed by GH (lost opportunity -- loss of use of money) -- plus attorney's fees, interest and costs – and reformed to reinstate the jury's finding on MSW's transactional loss ($10.235 Million). Multiple additional damage elements, claims and remedies must be rendered in favor of MSW or remanded.

STATEMENT OF THE CASE

MSW here incorporates by reference as if set forth in full its Statement of the Case presented in its Appellant's Brief filed with this Court on October 16, 2020.

STATEMENT REGARDING ORAL ARGUMENT

MSW prays the Court to hold oral argument, to emphasize and clarify its briefing, and to respond to questions from the Court. Tex. R. App. P. 39.2. MSW's appeal is not frivolous, its dispositive issues presented merit further discussion, and the decisional process would be aided by oral argument. Tex. R. App. P. 39.1.

ISSUE PRESENTED, RESTATED

1. GH asserts the evidence is legally and factually insufficient to support MSW's recovery for the "lost opportunity cost of not having use of the money" that was a natural, probable and foreseeable consequence of GH's failure to refinance the Ameristate Bank Loan (CR 3164). GH does not contest the liability finding (CR 3162). Crediting all evidence favoring the verdict if reasonable jurors could do so, and disregarding contrary evidence unless they could not, legally and factually sufficient evidence supports the verdict and this portion of the judgment.

STATEMENT OF FACTS

I. Challenges to GH's Statement

MSW incorporates by reference as if set forth in full the expansive dissertation of the record in its opening Appellant's Brief filed October 16, 2020. MSW does not agree with GH's truncated statement, which relies predominantly on the clerk's record rather than what it admits was six days of trial testimony. MSW's extended version gives the Court a complete understanding of the evidence and the proceedings.

Specifically, MSW challenges GH's statement that "Under Section 2 of the Settlement if MSW failed to exercise its Option, MSW was required to convey its one-half interest in the Landfill to Gulley-Hurst" (GH X-Ant Br at 5). GH also wrongly states it "negotiated with AmeriState Bank for refinancing the … $5,000,000 Note…" and "executed all of the financing documents required" (id. 6-7). Both misstate the record and are contrary to the jury's findings: MSW did not "convey its interest" to GH; and GH's attempted assignment and assumption was a breach of the MSA because it was not a refinance (CR 3171, 3162). The jury reiterated the latter when it also found MSW did not breach the MSA by refusing to accept the assignment/assumption (*compare* id. at 7 *with* CR 3168).

MSW further expressly contests GH's statement of "facts" regarding the (mis)handling of MSW's deed (X-Ant Br 5-6) (which GH admits it "filed of

record"). MSW has prayed this Court to remand those claims for trial.

Further, GH relies heavily on evidence regarding the principals' ability to obtain a loan and the interest rates they might pay (such as the up-to-18% interest rate GH states repeatedly in its brief) (X-Ant Br 7-8, 9, 11, 16). Notably, those rates were the result of GH's failure to release the personal guarantees, thus causing the individuals to be saddled with massively high interest rates, personally. GH's continual reference to these personal interest rates mixes apples and oranges, as this is not the loss MSW sustained as a result of its complete inability to close any deals at all. Indeed, the principals' damages caused by GH's failure to release them from their personal guarantees were submitted separately (CR 3165-67 [damage to credit reputation]). MSW, as a legal entity, could not participate in any other venture and could not close any deals at all, because it was still encumbered by the AmeriState debt. Thus, MSW's damage measures were different (CR 3162-64), including the "lost opportunity cost of not having use of the money" that should have been available to MSW if GH had refinanced the loan as required. The operational success (or lack thereof) of other landfills is likewise irrelevant to the analysis. GH analogizes a wholly separate landfill to the Corpus Christi Landfill (id. 8-9).

Finally, GH's argument about net interest rate is inapposite because it analyzes lost profits, not lost use of money. By this damage measure MSW sought, and the jury awarded, damages for the lost use of the $4.6 million, not lost

profits. Lost profits requires showing that a particular venture would be profitable (i.e., net of costs); lost use of money only requires showing a particular amount was unavailable and the value of that opportunity. Lost use of money damages are similar to judgment interest damages, which are not net of costs but rather encompass the value of the lost use of that money. Needham's testimony established, using minimum rates of return, the value MSW lost due to GH's failure to refinance the Ameristate loan.

II. Statement of Record Evidence Favorable to Jury Verdict

Specific to GH's issues presented in its cross-appellee's brief, which attack the legal and factual sufficiency of the evidence to support MSW's lost opportunity (loss of use of money) recovery, MSW would reiterate the following:

Tom Noons, who testified on behalf of MSW, told the jury GH was looking for a financial partner for the Landfill "because they [GH] didn't have the means or the financial ability to actually get the money necessary to open the Landfill. … They [GH] were out of cash, and one of the partners had some … tax issues." (16RR 66-67, 73-74) The Landfill was not operational, "it was basically just a hole in the ground with a permit, that's all it was." (id. 67) MSW paid $7.5 Million to purchase one-half of the Landfill, including obtaining a $5 Million loan from Ameristate Bank ($4 Million cash to GH, $1 Million working capital) (id. 59-60, 68, 69-71, 81, 82). All three MSW principals signed personal guarantees on the $5 Million loan (id. 77-

79). MSW had a borrowing history with Ameristate Bank, following Shoulders' long relationship and Sanders' as well (id. 71-73) (both testified they leveraged their relationships to obtain landfill financing [18RR 178; 19RR 203-06; 20RR 36]).

Following a dispute over operations and the filing of lawsuits by both sides (16RR 84-85), the parties executed a mediated settlement agreement providing that each party had 120 days to buy the other out; MSW had the first option (id. 87). If MSW did not purchase GH's 50% interest, GH had 120 days to purchase MSW's 50% interest under specific terms (id. 90-92) which included: "GH shall refinance the approximately $4,800,000 balance owed to AmeriState Bank by MSW and eliminate all personal guaranties and obligations of MSW and its guarantors for such loan…" (MSW Br. App. A, PX-48; 16RR 84-85, 86).

On February 25, 2016, after GH's 120 days had expired, GH offered an assignment/assumption of MSW's Ameristate loan, rather than a refinance as MSW bargained for in the MSA (16RR 136-37, 219). The MSA says nothing about assignment/assumption (id. 211). "[A]n assignment and assumption keeps the debt with the bank." (id. 212) "They were essentially not paying off the loan, not refinancing it, they were just assuming the debt." (16RR 133-34; PX-55, 75, 76; 17RR 12-14, 122-23) Noons testified:

> Part of the reason for the refinance was why you put it in the agreement, is that … we had bought this land from McKinney, and we were looking for a construction loan. And as I said earlier, it's very hard to get financing for a landfill, because Ameristate Bank had already done one

> for us. We were looking to them [Ameristate] to do another one …. So, the refinance is important to us because Ameristate Bank was not willing to keep two landfill loans on their books. So we were bargaining, in this agreement, that, okay, if we can't satisfy them, then they can buy our interest, do the refinance, we can go to Ameristate Bank, get our loan from them for the construction loan from McKinney and start the McKinney Landfill construction and get it open.

(16RR 137; 17RR 140, 141, 223). "[T]he sole reason for even putting in[to the MSA] the refinance at the Ameristate Bank was because Ameristate was our lender. We had the relationship with them. They were willing to give us a loan for the [McKinney] landfill if the Gulley-Hurst landfill was paid off. They did not want two landfills on their books." (16RR 94) MSW needed Ameristate free to do that loan (16RR 138, 145-46; 17RR 143, 230-31).

Shane Shoulders, a 20% owner of MSW, reiterated that MSW needed to free up capital so it could borrow from Ameristate again (20RR 199).

GH never refinanced within their 120-day option period (17RR 30, 20RR 9-10). "[GH] didn't live up to their obligations under that agreement." (17RR 94)

Because GH did not refinance the $5 Million Ameristate loan, MSW could not borrow that money again and invest it elsewhere (17RR 53-55, 62); that is, MSW was completely unable to secure funding for potential deals and could not close any deals at all. MSW lost the use of the money.

MSW's expert Allyn Needham analyzed and testified to MSW's lost opportunity cost of not having use of the money (17RR 55; 19RR 51, *passim*; CR

3164). Needham is an economist with multiple degrees, a long academic history and professional background, and over 30 articles authored, many peer reviewed (19RR 38-46). GH did not challenge his expert qualifications. Needham identified three economic losses sustained by MSW, including "the lost opportunity cost of not having use of the money that was a natural, probable, and foreseeable consequence of [GH's] failure to refinance the Ameristate loan." (CR 3164)

Needham testified MSW was entitled to "the economic theory called opportunity costs and the loss of opportunity. It is a straightforward calculation in that when [GH] did not purchase the one-half interest of MSW," "the opportunity for them [MSW] to borrow the remaining outstanding balance, which was a little over $4.6 million at that time, was lost to them." (19RR 51, 136) "And if you look at the fact that you can only borrow so much money, and if you've already borrowed it, then you can't borrow it to do something else. And what would the loss be to you for not being able to participate in some other venture, some other investment, and that's the concept of opportunity cost." (id. 51)

> Fortunately, for us, the United States has never defaulted on its debt, and it is the only country that can make such a claim. So that the treasury bonds, the treasury securities that are issued by the federal government are called risk free. It doesn't mean that you don't have the risk of inflation, it doesn't mean you don't have the risk of not being in the right investment; in other words, putting your money in the stock market you may make more than you would have in the treasuries. But what it means is you don't have the risk of losing your money, that when that -- when that note matures, when that bond matures you're gonna get your money back plus the interest that would have accrued

on it.

(19RR 52)

Needham "used a very minimum return, U.S. Treasury notes to show that by not having the availability to borrow this money, if they covered their interest rates and that if all they could get were recover the interest and what you could get for investing in treasury bonds, that they would still have a loss." (19RR 51) "So in this situation, … even at a minimum, if they were able to borrow that money starting at 4.6 million, ultimately by 2019, it would only be 4.4 million, but if you had that money and were able to invest it, cover your interest payment and all you made was the risk-free rate, there would still be a loss and that loss would be over $300,000." (id. 52-53) He also looked at the transactional history and documents that were part of this dispute, including "the transactional report on the loan with Ameristate Bank," to form his opinions (id. 48, 53).

Needham's report was shown to the jury and discussed at length at trial (19RR47-48, 49-55, 57, 59, 69-70 [50:"This is the next section and this is titled 'Los[t] Use of Money.' What is this, sir?" [53: "Let's go to page 5 please. Blow up that table please. Mr. Needham, this is a section of your report related to that, your opinion on los[t] use of money. You describe that table."]).

Page 5 of the report (Lost Use of Money) states:

The yields for the U.S. Treasury Securities maturing in ten years were taken from the Economic Report of the President, 2019. The 2019 treasury yield was taken from U.S. Bond and Market Rates as reported by Bloomberg. (5/10/2019, www.Bloomberg.com)

The results are as follows.

2016	4,686,857.70	1.84%	79,051.67
2017	4,595,212.54	2.33%	107,068.45
2018	4,506,036.84	2.91%	131,125.67
2019	4,472,786.28	2.47%	55,238.91
Alternative Return			372,484.70

Based on the information and assumptions discussed in this section and after applying techniques commonly used in the field of economics, I conclude MSW's opportunity cost from not having the outstanding AmeriState Bank loan from 2016 through 2019 is $372,484.70.

This calculation assumes the minimum rate of return MSW would have achieved had they been able to place this amount of money in an alternative investment is the interest rate charged on the loan plus this risk-free rate. The loan interest rate has ranged from 4.75% to 7.0% When totaled, the rate of return assumed from the alternative investment has remained less than 10% through the loan history.

(*see* PX-219, p. 5 [offer of proof]) Needham explained the table in his report to the jury this way:

> The first column, of course, are years, 2016 through 2019. The -- the second column, from the left is the outstanding balance on the loan as of the beginning of – I'm sorry, the end of the year, and so that if you apply the interest rate, which is right next to it, the 1.84 percent, that's what you would have received on a U. S. Treasury bond maturing in ten years, then that year, you would have received that first year $79,051.67. So that if you see that the -- the loan balance is declining and that's because payments are being made just like paying the mortgage on a house, there's principal and interest involved, each year the principal was declining, and so therefore that -- the amount that was not available for them to have to invest in other areas was decreasing. The interest rate that could have been achieved for that year 2.33 percent, the next year 2.91 percent, ultimately, 2.47 percent was estimated at the time I prepared the report for 2019. You can see that the interest rate would fluctuate, but at the same time, there is a

[opportunity] loss each year and that totals up to the $372,000 figure.

(19RR 53-54)

Needham testified,

Q. Okay. Now, your calculations did you make those with a reasonable degree of probability in economic certainty?

A. Absolutely, yes, sir.

Q. Okay. And the opinions that you formed, were those done with a reasonable degree of probability in economic certainty?

A. Yes, sir.

Q. Okay. And is it your opinion -- what is your opinion of MSW's damages with regard to lost use of money?

A. Well, looking at the lost use of money that using a minimal rate of return, their loss is $372,484.70.

(id. 55)

During cross-examination, Needham was able to further explain:

> There is always an opportunity lost. In other words, you may look at it and say oh, I'm making more money in this than I could have in the other -- the other deal. But there -- the other deal, the other investment, if it was positive, would always be a return that you could have had. In this situation, though, they have not – it's my understanding that MSW has not received any return, they have not had the ability to -- to put forth an offer to sell their one-half interest in the company, so therefore, they really haven't had any return on the investment that they had. And because of that, if the deal had closed, they would have had access to an additional $4.6 million, which could have been invested in another venture. They have not been able to, so what I looked at was what is the other venture. The fact that they have been able to move forward and do other things is not important to this assessment. What's important to this assessment was whether or not they had this additional

$4.6 million available to them for another investment.

(19RR 133-34, accord 130-31) "And for this, I used a minimum rate, the risk free rate that could have been achieved by just putting money in treasury bills." (19RR 131) "[T]he return would have been around 9 percent on that money." (id.)

Notably, GH put forth no controverting expert or witness on this damage assessment.

The jury weighed and accepted Needham's testimony, and found MSW was entitled to $372,484.70 in lost opportunity cost for the loss of the use of the money dedicated to a $5 Million loan GH was supposed to (but did not) refinance (CR3164).

GH filed a motion for JNOV on the jury's damage finding to Question 3(2) (CR3195; 23RR *passim*) and a motion for new trial on that finding alone (CR3409). GH made no challenge in any manner to the liability questions submitted or to the jury's finding that GH breached the MSA by failing to refinance the Ameristate loan (CR3195; 22RR 22, 49-53; 23RR *passim*).

SUMMARY OF THE ARGUMENT

Because GH did not refinance the Ameristate loan as required, MSW was completely unable to secure funding for potential deals and could not close deals at all. Accordingly, MSW was entitled to the lost opportunity cost of not having use of that money. MSW produced extensive evidence, from an expert economist, explaining that economic theory (which is supported in the law). GH presented no

controverting evidence. GH misstates the evidence and the expert's testimony to promote its theory, which is based on false premises and case law that does not apply.

GH's legal and factual sufficiency challenges must in all things be overruled. More than a scintilla of evidence exists to support the jury's finding; the evidence is not weak, and there is no contrary evidence at all, let alone overwhelming evidence. The portion of the judgment contested by GH must be affirmed (along with attorney's fees, costs and interest). For all the reasons stated in MSW's Appellant's Brief, the balance of the judgment must be reformed, reversed and rendered, and/or reversed and remanded.

ARGUMENT

I. Standards of Review

A. Legal Sufficiency

> 'In determining whether there is no evidence of probative force to support a jury's finding, all the record evidence must be considered in the light most favorable to the party in whose favor the verdict has been rendered,' *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), including evidence offered by the opposing party that supports the verdict. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) ('Nor can evidence supporting a verdict be identified by which party offered it . . . .').

Hill v. Shamoun & Norman, LLP, 544 S.W.3d 724, 736 (Tex. 2018). "The evidence is legally sufficient if it constitutes more than a 'scintilla' of evidence on which a reasonable juror could find the fact to be true." *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 613 (Tex. 2016); Tex. R. Civ. P. 301 (to disregard a jury

finding, the court must find that it has "no support in the evidence").

B. Factual Sufficiency

> When reviewing an assertion that the evidence is factually insufficient to support a finding, a court of appeals sets aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, it determines that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered.

Crosstex, 505 S.W.3d at 615. If the appeals court "reverses for factual insufficiency, it must detail the relevant evidence and clearly state why the evidence is factually insufficient." *Id*.; *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 761 (Tex. 2003). It is "clearly error" for the appellate court (and, for that matter, the trial court) to substitute its findings for those of the jury. *Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex. 1988) (collecting cases setting forth restrictions on appellate court's ability to reverse).

The record contains sufficient evidence that enabled this Nueces County jury—reasonable, fair-minded people—to conclude that, as to damage element 3(2), "MSW's lost opportunity cost of not having use of the money that was a natural, probable, and foreseeable consequence of GH's failure to refinance the AmeriState Bank Loan" was $372,484.70 (CR 3164).

II. MSW Tendered Far More than a Scintilla of Evidence

"Interest is an element of damages suffered by the 'loss of use' of money." *Tenn. Gas Pipeline Co. v. Technip USA Corp*., No. 01-06-00535-CV, 2008 Tex. App. LEXIS 6419, * 26 (Tex. App.—Houston [1st Dist.] Aug. 21, 2008, pet. denied) (mem. op.). TGP contended it suffered "a loss of borrowing power" and was entitled to "interest TGP theoretically could have earned on its money--generally 'ranging from five to six percent'--had it invested the funds it spent on this project in other investments during the delay period." *Id.* The court held interest is "an indirect loss" "because any return that might be attributable to theoretical investments TGP might have made falls outside" the parties' contract; as such, the claim was not compensable pursuant to the terms of the parties' specific agreement. *Id*. at * 27. The court made clear an interest claim is a consequential loss. *Id*.

Moreover, loss of use of money can be shown with evidence of a depletion in working capital. *Farmers & Merchants State Bank v. Ferguson*, 617 S.W.2d 918, 921-22 (Tex. 1981) (affirming jury award for loss of use of money after plaintiff's bank funds were frozen, thus resulting in a depletion of his working capital and inventory).

Further, in *Basic Capital Mgmt. v. Dynex Commercial, Inc.*, 402 S.W.3d 257 (Tex. App. – Dallas 2013, no pet.), relied on heavily by GH (X-Ant Br 12-14), the Dallas Court stated that "lost opportunity" "suggests that appellants were completely

unable to secure funding for potential deals," noting that the Supreme Court "interpreted it as such." *Id.* at 266. But in *Basic Capital*, plaintiff's expert "did not assume that plaintiffs would not close deals at all" (as here); the expert testified to lost profits, but not to lost opportunity (loss of use of money, as here). *Id.*

Here, MSW's expert testified to loss of use of money and to lost profits. As to the former, the evidence established that because GH failed to refinance the Ameristate Bank loan, MSW could not secure funding for potential deals and could not close deals at all. MSW's economist Needham explained this as "the economic theory called opportunity costs and the loss of opportunity. It is a straightforward calculation in that when [GH] did not purchase the one-half interest of MSW," "the opportunity for them [MSW] to borrow the remaining outstanding balance, which was a little over $4.6 million at that time, was lost to them." (19RR 51, 136) Needham calculated MSW's resulting loss of use of its money using the risk-free interest rate for U.S. Treasury Notes, on which economists in his field routinely rely when calculating economic damages:

> And for this, I used a minimum rate, the risk free rate that could have been achieved by just putting money in treasury bills. There is a little bit more nuance to that, in that it assumed the money would still be borrowed and therefore the return on the investment would cover the interest rate, as well as the risk free rate, which means that the return would have been around 9 percent on that money.

(19RR 131) Needham made clear he "used a *very minimum return*." (id. 51) Needham made detailed calculations, year by year, applying bond interest rates of

1.84, 2.33, 2.91, and 2.47 percent for each year, respectively, to the outstanding balance of the Ameristate loan each year (the amount of money MSW was unable to invest, with the balance decreasing each year) (id. 53-55).

In Year 1 MSW would have made $79,051.67 in interest at 1.84 percent on a 10-year treasury bond if the amount of money dedicated to the Ameristate loan had been available to MSW to invest (19RR 53-54). For the years 2017 through 2019, the bond interest rates were 2.33%, 2.91%, and 2.47%, respectively (id. 54). Needham charted the decreasing balance of the Ameristate loan for each of those years, showing the amount unavailable to MSW to invest was decreasing (id. 54). He calculated MSW's lost use of the money from February 2016 to July 1, 2019 (id. 50-55).

Applying the annual bond interest rate to the annual balance of the AmeriState loan (money MSW could not reinvest), Needham calculated MSW's lost opportunity to use and invest that money, year by year. "So in this situation, what I have said is, that even *at a minimum*, if they were able to borrow that money starting the 4.6 million, ultimately by 2019, it would only be 4.4 million, but if you had that money and were able to invest it, cover your interest payment and all you made was the risk-free rate, there would still be a loss [of opportunity] and that loss would be over $300,000." (19RR 52-53)

GH contends "These projections were not tied to any real investment that

MSW would have made, or even could have made" and suggests this is "hypothetical" (GH X-Ant Br 10, 12). But GH concedes MSW's representatives testified that MSW was not able to invest the money in another landfill, so the individuals had to find other sources of funding for themselves, leaving MSW without the opportunity (id. 10-11). Because MSW could not invest in the new landfill, and could not close deals at all, Needham testified to the lowest possible return on the money if MSW could use the money and invest it elsewhere – U.S. risk free treasury bills.

In sum, MSW's claim for lost opportunity (loss of use of money) is well supported in the law and the evidence. MSW established a claim for interest – at the U.S. Treasury Bill rate – for the loss of use of its money encumbered by GH's failure to refinance the Ameristate Bank loan. MSW also had a loss of working capital. And, MSW was completely unable to secure funding for potential deals or close any deals at all.

III. GH's No-Evidence Challenge Fails; Cases Cited in Support are Either Inapplicable or Support MSW, Not GH

GH does not acknowledge loss of use of money cases, but rather cites inapplicable lost profits cases to support its argument. For example, this was not a "speculative" investment, or "dependent on uncertain or changing market conditions," and it was not based on "chancy business opportunities" (X-Ant Br 12). GH's citation to *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d

276 (Tex. 1994) to support this argument is wholly misplaced, as that case deals specifically with lost profits. *Id.* at 277, 279 ("principal question presented" was "whether lost profits were proved with sufficient certainty to allow recovery;" stating rule for recovery of lost profits, which prohibits the scenarios quoted by GH).

Moreover, as Needham testified, U.S. Treasury bills are well-known and commonly used, and thus are the antithesis of "uncertain" or "chancy," "hypothetical" or "mythical." (X-Ant Br 16) His analysis was based on the fact that MSW "was completely unable to secure funding for potential deals" and MSW "would not close deals at all." *Basic Capital*, 402 S.W.3d at 266. Needham's calculation was not based on uncertain numbers, and is more than a scintilla of evidence. Notably, Needham did not advance an inflated rate of return on the investment, but rather the lowest possible rate available. GH presented no evidence or witness of any kind to controvert Needham's testimony on this accepted economic damage, never took Needham on voir dire, never challenged his qualifications, and raised no Rule 702 objections.

GH next suggests lost opportunity damages must be based on "the actual experiences of the plaintiff and other similar businesses," citing *Basic Capital*, 402 S.W.3d 257. (X-Ant Br 12-14). Notably, in *Basic Capital* the appellate court reversed the trial court's grant of JNOV and remanded for entry of judgment on the jury's verdict in favor of the plaintiff. *Id.* at 260. But *Basic Capital* specifically

addresses "consequential damages for breach of a contract to lend money." *Id.* at 265-66. The case had just been remanded from the Supreme Court, which held, "[t]o be liable for the consequential damages resulting from a breach of a loan commitment, the lender must have known, at the time the commitment was made, the nature of the borrower's intended use of the loan proceeds but not the details of the intended venture." *Id.* at 266.

Note, again, *Basic Capital* was not a case in which the plaintiff could not close deals at all, as here. *Id*. at 266 ("the 'lost opportunity' title suggests that appellants were completely unable to secure funding for potential deals, and the supreme court may have interpreted it as such …."). "Perryman [plaintiffs' expert] did not assume that plaintiffs would not close deals at all, but rather that they lost the profits that would have resulted from the investment of an additional $155 million in the regular course of their business;" "Perryman [the expert] calculated appellants' alleged lost profits under his 'lost opportunity' model." *Id.* (emphasis added). Thus, the appellate court considered the sufficiency of the evidence to support lost profits. "Perryman's assumption was that appellants, in the business of making real estate investments, would use the additional $155 million in the same way that it used other sources of funds." *Id.* at 268. The court analyzed the evidence quoting *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80 (Tex. 1992) and the Supreme Court's stated standards to prove lost profits therein. *Id.* at 267-68. GH incorrectly relies on *Holt Atherton*

here as well (X-Ant Br 15), mentioning none of these distinctions in its brief.

Indeed, this case is unlike *Basic Capital* in several marked ways: (1) GH did not fail to make a loan to MSW and the MSA was not a contract to lend money -- it bears no resemblance to the *Basic Capital* loan commitment; (2) MSW was "completely unable to secure funding for potential deals" and "could not close any deals at all" as a result of GH's breach (thus resulting in true "lost opportunity" damages – the loss of use of the money); (3) MSW's expert Needham based his analysis on MSW's inability to close deals at all; and (4) Needham differentiated between damages for lost opportunity (loss of use of money) and damages for lost profits.[2]

Basic Capital is generally instructive in one way: the plaintiff's damage model was built and presented by an economist who relied on company financial information and "relevant industry and market information, including publicly available information;" he used the "*lowest*" "rate of return in his damages model;" and the expert determined the cost of the funds "based on published historical and projected interest rates." *Id*. at 266-267. The court of appeals held this evidence was sufficient to support the jury's findings.

[2] Needham's lost profits calculation, analysis and assessment used entirely different data—MSW's one half of the income from the Landfill, less certain expenses. MSW's requested submission of that separate and distinct damage model should have been permitted (MSW incorporates by reference its factual statement and briefing on this issue in its Appellant's Brief).

MSW's expert Needham did all of the same things here: he used Landfill financial information (including the transactional report on the loan with Ameristate Bank), relevant industry and market information (including publicly available information), published interest rates, and the lowest rate of return. He determined the cost of the funds based on published historical interest rates. This evidence, likewise, is sufficient to support the verdict and judgment.

Basic Capital also reminds us:

> The jury is the sole arbiter of disputed testimony, the credibility of the witnesses, and of the weight to give their testimony. They may choose to believe one witness and disbelieve another. A reviewing court may not impose its own opinion to the contrary. In reviewing the verdict, we must assume that jurors credited testimony favorable to the verdict and disbelieved testimony contrary to it.

Id., 402 S.W.3d at 262 (citing *City of Keller*, 168 S.W.3d at 819). As here, "Almost every fact relating to the appellants' [plaintiffs'] claims and Dynex's defenses was hotly contested." *Id.* The jury having resolved the conflicts in plaintiffs' favor in *Basic Capital*, the trial court could not overturn those findings. *See, e.g.*, *id.* at 263, 264, 265, 268, 269. So too here, the jury's finding cannot be disregarded.

GH also relies on *Shell Oil Prods. Co. v. Main St. Ventures*, 90 S.W.3d 375 (Tex. App.—Dallas 2002, pet. dism'd by agr.) (X-Ant Br 15) for the proposition that there must be evidence of "details and specifics in the same business venture being disputed." *Shell Oil* does not help GH. The plaintiff alleged tort claims, for fraud and negligent misrepresentation: Main Street contended Shell duped it into believing

they would enter into a joint venture to develop food court/gas stations, and in reliance Main Street (1) rejected a third party's offer to invest in the business and (2) continued to develop other properties with the expectation of funding from Shell. *Id.* at 379-80. Plaintiff alleged, as lost opportunity, the investment by the third party that Main Street rejected: "$4 million from turning down opportunities to sell interests in Main Street in reliance on promises or representations made by Shell." *Id.* at 383, 384. $4 Million was the amount of funding Main Street expected to receive; the jury awarded this amount as damages. *Id.* at 384-85.

However, Main Street contended it was not required to prove the "net benefit" of the funding to support recovery for lost opportunity. *Id.* at 385. Thus, as the appellate court noted, "there was no evidence specifically detailing how the $4 million would have been used." *Id.* The court held, "There must also be a showing that turning down the offer resulted in injury and proof of the amount of that injury;" because no evidence was proffered at all, there could be no recovery to plaintiff Main Street. *Id*. at 385.

Here, MSW not only recognized that it had to prove the net benefit of the Ameristate loan proceeds if they had been available, but it did prove that net benefit, to establish its lost opportunity cost of not having use of the money. First, there is no dispute MSW was unable to invest in any deal at all. Second, the evidence is uncontroverted that MSW lost completely the opportunity to obtain a return on its

investment. Third, MSW proved the injury and the amount: Needham testified to "the economic theory called opportunity costs and the loss of opportunity" and used the lowest rate of return MSW would have experienced if it had use of the money and was able to invest it. Needham testified to the smallest, most guaranteed rate of return, with details and specifics in the form of each year's interest rate and principal unavailable (based on the balance due on the AmeriState note), and he made partial-year calculations as appropriate for 2016 and 2019. The jury was provided an analysis of the lost use of the money for each year 2016, 2017, 2018 and 2019. None of this testimony was controverted. Here, unlike *Shell Oil*, the evidence provided "details and specifics" for MSW's lost opportunity (loss of use of money) damages.

Moreover, *Shell Oil* upheld the additional consequential damage award – "the amount of debts that [Main Street] was unable to pay ($1.667 million) that was a 'natural, probable, and foreseeable consequence of [defendant's] conduct." *Id.*, 90 S.W.3d at 385. The court held:

> Shell also contends that even if these debts can be attributable to Main Street, there is no evidence that they were incurred because of representations made by Shell. According to the question submitted to the jury, however, Main Street was only required to prove that its inability to pay these debts was a 'natural, probable, and foreseeable consequence of Shell's conduct.' Main Street's theory at trial was that its reliance on Shell's promises and representations caused the destruction of its business and resulted in its inability to pay its debts. Blair testified that Main Street's failure to pay these debts was caused by its reliance on Shell's promises. Because there is evidence that Main Street is ultimately responsible for these debts and its inability to pay them was caused by Shell's conduct, we conclude that the evidence is

> legally and factually sufficient to support the jury's award on this element of damage.

Id. at 386.

Similarly here, the jury was instructed to find "MSW's lost opportunity cost of not having use of the money that was a natural, probable, and foreseeable consequence of GH's failure to refinance the AmeriState bank Loan." (CR 3164) MSW proved that GH's failure to refinance naturally, probably and foreseeably caused its inability to reinvest the money. *Shell Oil*, 90 S.W.3d at 386. MSW's expert used reliable, published data and the lowest rate of return when determining those damages. The jury followed this competent evidence, given with a reasonable degree of probability and economic certainty (CR 3164). That portion of the judgment (plus attorney's fees, interest and costs) must be affirmed.

As noted, GH cites *Holt Atherton*, but recognizes "the issue [in that case] was whether there was enough evidence to support a jury award of lost profits." (X-Ant Br 15) *Holt Atherton* specifically analyzes lost profits. Here, over MSW's objection, the trial court refused to permit discovery on lost profits, to permit testimony and evidence of same at trial, and to include MSW's requested lost profits damage submission in the charge. Unlike *Holt Atherton*, there is no question about the identity of the contract for which MSW lost the benefit (contrary to X-Ant Br 15, 16): the MSA. Because GH did not purchase MSW's undivided 50% ownership interest in the Corpus Christi Landfill under that agreement (which expressly

designates MSW as an owner), MSW remained an owner entitled to profits from the company. Needham provided a detailed analysis of lost profits owing to MSW with the information he could gather, even with the trial court's refusal to allow MSW to have current financial information for the operation (*see* MSW's Appellant's Brief). Offers of proof were made on this topic at trial. In the end, *Holt Atherton* actually bolsters MSW's appellate position that it was entitled to lost profit damages as a result of GH's breach. Because GH has not contested the jury's liability finding, a remand for trial on lost profit damages alone is proper, as MSW has argued at length in its Appellant's Brief.

Finally, GH's arguments about additional interest rates necessary to reach a certain outcome (X-Ant Br 16) are untethered to the record. Needham testified, "And for this, I used a minimum rate, the risk free rate that could have been achieved by just putting money in treasury bills. There is a little bit more nuance to that, in that it assumed the money would still be borrowed and therefore the return on the investment would cover the interest rate, as well as the risk free rate, which means that the return would have been around 9 percent on that money." (19RR 131) Needham relied on the transactional report on the loan with Ameristate Bank in forming his opinions, which included loan interest rates (19RR 48, 53). Needham made clear that in 2016, for instance, the loan balance was $4.6 Million. At the 1.84% Treasury Bill rate of return that year, and beginning the calculation starting

in February 2016, $4.6 Million would have generated $79,051.67 in interest (principal multiplied by .0184). All interest rates necessary were discussed and applied. GH is not conducting a proper review of the record.

IV. GH's Cursory New Trial Argument Similarly Lacks Merit

Regarding its claim for a new trial, GH's sole, perfunctory argument is that the investment in treasury bills was hypothetical (X-Ant Br 17). GH then relies on yet another case about lost profits, not loss of use of money, as GH's own discussion makes clear (id. 17-18). GH argues, "the only evidence presented by MSW concerned anticipated or potential profits based on a hypothetical investment…." (id. 19) The judgment is for loss of use of money. The trial court improvidently refused to submit lost profits, and MSW seeks a remand for that relief, to which it is also entitled.

Moreover, GH wholly fails to present the complete testimony of the expert, or the extensive additional evidence in the record, that is necessary to bring forth a meaningful factual sufficiency claim. This Court must "detail the relevant evidence and clearly state why the evidence is factually insufficient," which GH wholly fails to do. *Golden Eagle Archery,* 116 S.W.3d at 761. All evidence favorable to the jury's verdict must be considered, but GH refuses to consider it. This Court cannot substitute its findings for those of the jury. *Herbert*, 754 S.W.2d at 144.

Finally, it bears repeating that GH has never attacked the liability findings

against it in this case. GH breached the MSA by failing to refinance the Ameristate loan. That breach had clear consequences, including MSW's undisputed inability to reinvest the millions of dollars encumbered by that loan. The jury accepted expert Needham's detailed and carefully explained testimony. His damage model was not based on hypothetical or mythical calculations, but on U.S. Treasury Bonds, which are fixed-rate and commonly used. Needham provided the minimum return MSW would have seen on that money if it was available to invest. GH tendered no controverting evidence. Any suggestion that the jury's finding is against the overwhelming weight of the contrary evidence is misplaced, because there is no contrary evidence. GH submitted none.

In sum, the record contains more than sufficient evidence to support the verdict. GH's request for a new trial must in all things be denied. If the Court is of the opinion that the evidence is factually insufficient to support the lost opportunity award, then that damage element only should be remanded for trial (liability being uncontested). Tex. R. App. P. 43.2, 43.3.

***

PRAYER

MSW, Appellant and Cross-Appellee, prays for the following:

1. Overrule GH's issues presented and affirm the trial court's judgment awarding MSW's lost opportunity cost in the amount of $372,484.70, attorney's fees, interest and costs;

and

a. Sustain MSW's issues presented, modify the trial court's judgment to reinstate the jury's $10.235 Million verdict, and affirm as modified;
b. In the alternative, remand lost profits for trial;
c. Hold this was an option contract with which GH failed to comply and modify the judgment to reinstate the jury's $10.235 Million damage finding, otherwise remand MSW's damages for trial; and/or
d. Hold rescission of the MSA is appropriate, thus placing the parties back into their pre-MSA positions, otherwise remand for further proceedings on that issue;

and

2. Remand MSW's claims improvidently disposed by the trial court by summary judgment, including fraud;

and

3. If the Court finds the evidence is factually insufficient to support the lost opportunity cost award, then that damage element should be remanded for trial (liability being uncontested).

MSW prays for all other relief to which it is entitled, at law and in equity.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies, pursuant to TEX. R. APP. P. 9.4(i)(2)(B), that this computer-generated brief is 7,555 words long according to the word count of the computer program used to prepare this document (Microsoft Office Word 2010), from the Brief Statement in Response through the end of the Prayer. Typeface font is 14-point in the body and 13-point in the footnotes.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief was served on counsel for the Appellee, as designated below, on this the 16th day of December, 2020, by tex.gov electronic filing service:

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